(8)

No. 129, Original

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

REPLY BRIEF

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INTRODUCTION

After Virginia filed suit here, Maryland passed legislation to ban new water intakes in the Potomac River for at least the next three years and to limit the capacity of any "replacement" intakes. The purpose is to freeze Virginia's use of the River and to control Northern Virginia's economic growth. To consummate that plan, Maryland has adopted a strategy of delay in this Court to complement its administrative delay that, since 1996, has prevented construction of an offshore intake that Virginia believes is an "essential public health initiative" (App. 131a).

Maryland's highest court has ruled that the 1785 Compact does not apply above tidal waters. Moreover, Maryland now argues that Virginia has waived its Compact rights because various Virginia citizens and localities have applied to Maryland for permits. Obviously, any attempt by Virginia to raise its Compact claims in Maryland is doomed from the outset. If Virginia's Compact issues are to be resolved fairly, they must be heard here.

Maryland, however, states that this Court should decline original jurisdiction on the bare possibility that Maryland might render the Compact issues irrelevant by some day granting the permit. But that application has been pending since 1996, and the new legislation guarantees that it will remain so for many more years, and perhaps forever. Maryland places Virginia in a "Catch-22." It demands that Virginia submit to Maryland's authority over access to the Potomac River but refuses to provide an adequate forum to resolve the Compact issues. The only feasible and fair solution is original jurisdiction in this Court and resolution of Virginia's claims in a neutral forum.

RECENT MARYLAND LEGISLATION TARGETING VIRGINIA'S POTOMAC RIVER ACCESS

In its session ending April 10, 2000, Maryland's legislature unanimously passed two versions of the so-called "Potomac River Protection Act," H.B. 395 (Supp. App. W) and S.B. 729 (Supp. App. X). Both bills assert Maryland's exclusive control over the River. Maryland Governor Parris Glendening's

spokesman has announced that the Governor intends to sign one of the versions into law.[1] Both bills forbid the Maryland Department of Environment ("MDE") from issuing any waterway construction permit for any new water intake structures until six months after MDE submits the results of three studies to the Maryland legislature. (Supp. App. W, X, § I(b)). H.B. 395 has no deadline by which MDE must submit those results, thus creating the potential for indefinite delay. S.B. 729 provides for the studies to be submitted by July 1, 2002. (Supp. App. X, § I(a)). Combined with the 6-month permit moratorium following that submission, S.B. 729 creates a three-year delay.

In the interim, both bills prohibit *any* new Virginia intakes in the River, thus preventing Loudoun County and the Loudoun County Sanitation Authority from constructing a new water intake that they are considering. (*Brief Amicus Curiae of Loudoun County et al.* at 7). While both bills purport to allow MDE to approve "replacement" intakes, they limit the physical capacity of the replacement intake and vest in Maryland exclusive control over future intake capacity. (Supp. App. W, X; Supp. App. Z, Crowder Decl. ¶ 6). Both bills seek to freeze economic development in Northern Virginia, a purpose specifically trumpeted by their sponsors. (*See* Supp. App. Y, Kronenthal Decl. ¶ 3; *Maryland to Restrict Fairfax Use of Potomac*, *supra*).

For instance, Senator Van Hollen, the chief sponsor of S.B. 729, testified that his bill was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. (Supp. App. Y, ¶ 3). He said that a limitation on the intake's capacity was needed to ensure that Virginia will not be "fueling more development on the Virginia side of the river, which has been out of control." (*Id.*). Van Hollen also urged that since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the

1. Matthew Mosk, *Maryland to Restrict Fairfax Use of Potomac*, The Washington Post, Mar. 28, 2000, at B1.

right to withdraw water from the Potomac River without Maryland's consent, the limitation on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval. (*Id.*). To minimize the legislation's impact on Maryland, the bills were specifically amended in order to *exempt* three *Maryland* entities from the prohibition on constructing new water intakes. (*Id.*, ¶ 6).

I. THE CONTROVERSY IS SERIOUS, JUSTICIABLE AND RIPE.

This controversy is serious, justiciable and ripe. Accelerating acrimony between the States prompted Maryland State Senator Clarence W. Blount to state starkly that if "Virginia and Maryland were independent states, we would be at war over this." (Supp. App. Y, ¶ 4). Virginia officials have likewise returned Maryland's fire. *See Maryland to Restrict Fairfax Use of Potomac*, *supra* (B. Rubin stating that "[i]f they want to pass laws, we can, too.").

This Court's exclusive original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Virginia seeks to do that here by vindicating its rights under Clause IV of the Black-Jenkins Award (App. 48a-49a), Article VII of the 1785 Compact (App. 3a, 75a), and Article VII, § 1, of the 1958 Compact (App. 75a), to use the waters of the Potomac River and to build improvements appurtenant to the Virginia shoreline.

Maryland is violating those compacts by asserting exclusive control over Virginia's access to the River. Virginia is suffering injury from Maryland's actions, including the denial of Potomac River access, continued exposure of its citizens to unnecessary public health risks,[2] risk of an interrupted water supply,

2. Virginia considers the offshore intake to be an "essential public health initiative." (App. 131a). Many years' operating data and mid-river sampling confirm that water in the River's channel contains fewer

(Cont'd)

substantial unnecessary water treatment costs that can never be recovered, and interference with the plans of several governmental subdivisions to use the River as a drinking water source. (Bill Comp. ¶¶ 19-25, 43; Loudoun Br. at 3-5).

In *Colorado v. New Mexico*, 459 U.S. 176 (1982), a case ignored by Maryland, the Court found that Colorado had standing to assert its interests in the Vermejo River against competing claims on the River by New Mexico. *Id.* at 182 n.9. A single, private company in Colorado planned to use the River for "industrial development and other purposes." *Id.* at 178. The Court rejected New Mexico's argument that Colorado was "improperly suing directly and solely for the benefit of a private individual," stating that "other Colorado citizens may *jointly use the water or purchase water rights in the future*," and emphasizing that "Colorado surely has a sovereign interest in the beneficial effects of a diversion *on the general prosperity of the State*." *Id.* at n.9 (emphasis added). *See also Kansas v. Colorado*, 206 U.S. 46, 99 (1907) (under similar circumstances concluding that "[t]he controversy rises above a mere question of local private right and involves a matter of state interest and must be considered from that standpoint").[3]

(Cont'd)
contaminants and pathogens than water on either shore, and is necessary to produce the purest and safest drinking water. (*Id.*; Bill Comp. ¶ 21-25). The fact that drinking water currently produced by FCWA meets minimum federal standards does not obviate the health risks posed by drawing turbid water with greater concentrations of pathogens from the shore. Waterborne disease outbreaks resulting in many deaths and illnesses have occurred recently in communities that likewise met minimum state and federal water quality standards. (*Id.* ¶ 22-25).

3. For other justiciability cases recognizing the State's interest in protecting its citizens' water rights, health or comfort, *see Maryland v. Louisiana*, 451 U.S. 725, 737-38 (1981); *United States v. Nevada*, 412 U.S. 534, 539 (1973); *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). Virginia also has standing as a direct consumer of Potomac River water by more than 100 State government offices. (Bill Comp. ¶ 3).

Virginia's interest is even more compelling. The bulk of Northern Virginia's population depends on the Potomac River to supply drinking water and fire protection needs; their interests are presently and gravely threatened by Maryland's efforts to impede Virginia's access to the River.

II. NO ALTERNATIVE FORUM IS FAIR OR ADEQUATE.

The premise of this Court's alternative forum analysis is that if a State can receive fair consideration of its claims in another "appropriate" forum, judicial resources may be saved by declining an original action lawsuit. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Whether another forum is "appropriate" must be decided "on a case-by-case basis." *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). Stated bluntly, Virginia has not gotten and will not get fair consideration of its compact rights in Maryland. Original jurisdiction is warranted because "parochial factors" in Maryland have led at least "to the appearance, if not the reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

Every branch of Maryland government has already decided Virginia's compact rights against Virginia and in favor of Maryland. After watching the permit application of the Fairfax County Water Authority ("FCWA") proceed for four years, the Maryland General Assembly stepped in to freeze Virginia's use of the Potomac while the sponsors boasted openly that their legislation will control Northern Virginia's economic development. (Supp. App. Y, ¶ 3; Bill Comp. ¶¶ 32, 41). Maryland's Governor personally intervened in the administrative proceeding to deny FCWA's waterway construction permit. (App. 134a). J.L Hearn, the senior MDE official who originally withheld FCWA's permit, recently told FCWA that MDE will still not issue the waterway construction permit, even with the limitations set forth in the new legislation, because of the positions already taken by his superiors (the Governor and the Secretary of MDE). (Supp. App. Z, Crowder Decl. ¶¶ 2-3). The Maryland Attorney General maintains that Virginia has no

compact rights upstream of the tidal reach of the Potomac and that, even if it did, they would be subject to Maryland regulation. (App. 180a-181a). And Maryland's highest court has ruled that the 1785 Compact does not apply above tidal waters. *Middlekauff v. LeCompte*, 132 A. 48, 50 (Md. 1926).

Barring a surprise reversal some day by the Maryland Court of Appeals of its own decision in *Middlekauf*, Maryland is not going to acknowledge Virginia's compact rights. Yet, only this Court has the power to interpret the compacts in question in a manner binding on both States. *Mississippi v. Louisiana*, 506 U.S. at 77-78; *Texas v. New Mexico*, 462 U.S. at 568; *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 29 (1951). Without an original action, the only prospect for resolving the compact dispute would be by petition to this Court for writ of certiorari, *perhaps a decade or more from now*, to the Maryland Court of Appeals.

Thus, the judicial economy ordinarily expected when this Court declines original jurisdiction in favor of another forum simply cannot be obtained. Relegating Virginia to Maryland's tribunals under the facts of this case will lead only to needless expense, delay and continued injury to Virginia. It will also run counter to the principle that "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Dyer*, 341 U.S. at 28. That principle is especially true here, where the State has *already* decided the matter in its own favor.

This Court should likewise reject Maryland's argument (Opp. 12-13) that the compact issues presented here might be avoided if MDE should have a change of heart about the FCWA's permit, or if the Maryland courts on appeal should determine that the FCWA is entitled to a waterway construction permit under Maryland state law.[4] Even accepting that unlikely premise, it would not provide the relief to which Virginia is entitled and

4. The Army Corps of Engineers has required FCWA to resolve the dispute over the Maryland construction permit as a condition of obtaining reinstatement of the previously issued federal permits. (App 177a). Maryland's refusal has killed the project.

seeks in this Court: a determination that the compacts prevent Maryland from requiring that Virginia and its subdivisions obtain Maryland's permission to access the Potomac River. In short, neither Virginia nor any of its subdivisions should have to submit to Maryland's authority in the first place.

This case is more like *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court rejected the alternative forum as inadequate, and less like *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), where the Court found the alternative forum appropriate. One reason the state court was inadequate in *Maryland v. Louisiana*, but not in *Arizona v. New Mexico*, was that the plaintiff States in *Maryland v. Louisiana* were suffering continuing injury by a delay in a final resolution of their claims (just like Virginia here). 451 U.S. at 743. Significantly, in neither of those cases had the state courts *already* decided the issue in dispute, as the Maryland Court of Appeals has done here. In neither case was the state governmental process parochial and biased, as Maryland's clearly is. This case thus presents a far stronger basis for rejecting the alternative forum than *Maryland v. Louisiana*.

III. MARYLAND BETRAYS ITS DISREGARD FOR VIRGINIA'S RIGHTS.

Part II of Maryland's opposition argues that Virginia does not have compact rights upstream of the tidal reach and that, if it does, those rights are subject to Maryland's regulation. Maryland's argument betrays its contempt for Virginia's rights.

Once an interstate compact is consented to by Congress, it is transformed "into a law of the United States." *Texas v. New Mexico*, 462 U.S. at 564. "One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.*[5] In this case, the express terms of all three Maryland-Virginia compacts clearly

5. The unmistakability and reserved powers doctrines (Opp. 19-20), which deal with contracts rather than *federal* laws, are thus inapposite.

give Virginia and its citizens "the privilege of making and carrying out wharfs and other improvements," Compact of 1785, Art. VII (App. 3a); Compact of 1958, Art. VII, § 1 (App. 75a); and the "right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership. . . ." Black-Jenkins Award, Cl. 4 (App. 48a-49a).

Nothing in the compacts gives Maryland the right to determine whether Virginia "needs" to withdraw water from the River or to build improvements on the Virginia shore. Virginia is entitled to make that judgment for herself and to regulate her own citizens' use of the River accordingly.[6] Maryland's usurpation of that authority stands as a direct obstacle both to the express language of the three compacts, as well as to their obvious purpose, which was to protect Virginia's access to, and use of, the Potomac River.

Maryland's claim that the compacts do not apply upstream of the tidal reach likewise ignores the plain language of Article

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6. *Sporhase v. Nebraska*, 458 U.S. 941 (1982), which recognized Nebraska's limited right to regulate groundwater withdrawals from its own territory, is distinguishable for two reasons. First, unlike this case, no interstate compact was involved. Second, Nebraska's authority was tied to protecting groundwater "in times of severe shortage." *Id.* at 956. That interest does not apply here because the LFAA already grants Virginia, Maryland and the District of Columbia an equitable allocation during water shortages. (LFAA Art. II(C), App. 88a). When water in the River is not scarce and the LFAA is not in effect, Virginia has the same right as Maryland to withdraw water from the River, notwithstanding that Maryland owns the riverbed. *E.g.*, *Colorado v. New Mexico*, 459 U.S. at 181 n.8 (mere ownership of the riverbed did not give the upstream State the right to divert water to the detriment of the downstream State); *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (same). Maryland's new legislation, and its permitting system as applied to Virginia, attempt to circumvent this Court's requirement that a State seeking to prevent another State from diverting water from an interstate stream prove first by clear and convincing evidence that the diversion will cause it injury or damage. *Colorado v. New Mexico*, 459 U.S. at 187 & n.13. Maryland cannot make that showing here.

VII of the 1785 Compact, which imposes no such limitation, as well as Clause IV of the Black-Jenkins Award, ratified by Congress, which provides that Virginia retains the right to use the River along the entire boundary between the States. (App. 48a-49a). The Black-Jenkins arbitrators in their accompanying opinion rejected the same argument Maryland advances here. They concluded that the 1785 Compact applies "to the whole course of the river above the Great Falls as well as below." (App. 29a). This Court expressly agreed with the arbitrators' opinion in *Maryland v. West Virginia*, 217 U.S. 577, 580 (1910), a case Maryland fails to cite. That case held that West Virginia and its citizens succeeded to Virginia's rights to use the Potomac River and to build improvements on the West Virginia shore pursuant to Article VII of the Compact of 1785. *Id.* at 580-81, 585. That holding would have been impossible if this Court had believed that Article VII was inapplicable in the non-tidal waters of the Potomac in West Virginia.

Finally, Maryland unreasonably argues that Virginia has waived its compact rights because several Virginia localities and citizens applied to Maryland for permits beginning sometime in the 1960s. Permit submissions made "as a matter of comity and ease of administration" (App. 177a) do not establish that Virginia as a state has conceded Maryland's right to control Virginia's access to the River. Moreover, the period of time necessary for one state to acquire jurisdiction as against another by prescription must be "substantial," *New Jersey v. New York*, 523 U.S. 767, 786 (1998) (stating that a minimum of 60 years might be sufficient), and the latter state during that time must have "acquiesced in the impositions upon it." *Id.* The period of time here is neither "substantial" nor has Virginia acquiesced in ceding any sovereignty to Maryland. *Id.* at 786. It was not until December 1997 that Maryland first denied any permit to any Virginia user (Bill Comp. ¶ 14).[7] Virginia could

7. Maryland's argument that Virginia should have filed suit after the 1926 Maryland Court of Appeals decision in *Middlekauff v. LeCompte* is similarly perplexing. While that case did rule that the 1785 (Cont'd)

rightly believe (even assuming that it knew about permit applications filed by its citizens or localities), that its rights to use the River and to build "wharves and other improvements" (App. 75a) had simply "not been in controversy," just as the Commissioners who drafted the 1958 Compact had stated (App. 58a).

CONCLUSION

Maryland will continue to deny Virginia her compact rights in the Potomac River unless and until this Court intervenes. This case is extremely important to the health and comfort of the people of Virginia. The motion for leave to file the bill of complaint should be granted.

Respectfully submitted,

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May 2, 2000

(Cont'd)
Compact did not apply above tidal waters, the case involved only *West Virginia* citizens who were prevented by Maryland from fishing in the upper Potomac. 132 A. at 48.

APPENDIX

APPENDIX W — MARYLAND HOUSE BILL 395 (PASSED UNANIMOUSLY 4/3/2000)

HOUSE BILL 395

Unofficial Copy 2000 Regular Session
M3 0lr0921
HB 615/99 - ENV

By: **Delegates Cryor, Barkley, Barve, Bronrott, Boutin, Cadden, Cane, Carlson, Clagett, Conroy,Dembrow, Dypski, Frush, Glassman, Goldwater, Grosfeld, Heller, Howard, Kach, Leopold, Petzold, Rosso, Riley, Sher, Stern, Stocksdale, Walkup, Kopp, Phillips, La Vay, ~~and Shriver~~ Shriver, and Hubbard**

Introduced and read first time: February 3, 2000
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 25, 2000

CHAPTER_____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of ~~prohibiting a person from constructing or blasting in the Potomac~~

Appendix W

~~River under certain circumstances; prohibiting the Secretary of the~~
~~Environment from issuing a waterway construction permit to construct a water~~
~~intake pipe in the Potomac River unless certain circumstances exist;~~ requiring the Secretary of the Environment to submit certain reports to the General Assembly; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing a certain exception to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; ~~providing for the legislative intent of this Act; defining a certain term;~~ and generally relating to the ~~protection of~~ waters in the Potomac River basin.

~~BY adding to~~
~~Article - Environment~~
~~Section 5-12A-01 through 5-12A-04, inclusive, to be under the new subtitle~~
~~"Subtitle 12A. Potomac River Protection Act"~~
~~Annotated Code of Maryland~~
~~(1996 Replacement Volume and 1999 Supplement)~~

Appendix W

HOUSE BILL 395

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That ~~the Laws of Maryland read as follows~~:

~~**Article – Environment**~~

~~SUBTITLE 12A. POTOMAC RIVER PROTECTION ACT.~~

~~5-12A-01.~~

~~IN THIS SUBTITLE, "MGD" MEANS MILLION OF GALLONS OF WATER PER DAY.~~

~~5-12A-02.~~

~~THE PURPOSE OF THIS SUBTITLE IS TO:~~

~~(1) ASSIST THE PEOPLE OF MARYLAND IN OBTAINING THE PROTECTION AND ENHANCEMENT OF THE POTOMAC RIVER IN ACCORDANCE WITH THE OBJECTIVES OF ITS AMERICAN HERITAGE RIVER DESIGNATION; AND~~

~~(2) PRESERVE THE POTOMAC RIVER FOR FUTURE GENERATIONS.~~

~~5-12A-03.~~

~~(A) UNTIL STUDIES CONCERNING THE POTOMAC RIVER AND WATER RESOURCES IN THE WASHINGTON METROPOLITAN AREA ARE COMPLETED AND SUBMITTED TO THE GOVERNOR AND GENERAL ASSEMBLY, A PERSON MAY NOT:~~

~~(1) CONSTRUCT A WATER INTAKE STRUCTURE IN THE POTOMAC RIVER WITH THE CAPACITY TO WITHDRAW MORE THAN 50 MGD;~~

~~(2) BLAST THE POTOMAC RIVERBED FOR A WATER INTAKE STRUCTURE;~~
~~OR~~

~~(3) CONSTRUCT AN INTAKE STRUCTURE UNLESS THE WATER INTAKE STRUCTURE IS AT LEAST 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

~~5-12A-04.~~

~~THE SECRETARY MAY NOT GRANT A WATERWAY CONSTRUCTION PERMIT TO ANY PERSON TO CONSTRUCT A WATER INTAKE PIPE IN THE POTOMAC RIVER UNLESS:~~

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~~(1) THE PIPE WILL BE USED AS AN ALTERNATIVE FOR A PIPE ALREADY IN USE;~~

~~(2) THE PIPE CANNOT BE USED CONCURRENTLY WITH THE PIPE ALREADY IN USE;~~

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HOUSE BILL 395

~~(3) THE PIPE DOES NOT HAVE THE PHYSICAL CAPACITY TO WITHDRAW FROM THE POTOMAC RIVER AN AMOUNT OF WATER THAT EXCEEDS THE CAPACITY OF THE INTAKE ALREADY IN USE; AND~~

~~(4) THE PIPE IS PLACED NOT LESS THAN 30 INCHES BELOW THE WATER SURFACE AT THE RIVER'S HISTORIC LOW FLOW.~~

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article:

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; and

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment.

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(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The new pipe will replace a pipe already in use;

(2) The new pipe cannot be used concurrently with the pipe to be replaced;

(3) The new pipe does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

(4) The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow.

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

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(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION ~~2.~~ 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any

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HOUSE BILL 395

reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION ~~3.~~ 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

APPENDIX X — MARYLAND SENATE BILL 729 (PASSED UNANIMOUSLY 4/7/2000)

SENATE BILL 729

Unofficial Copy
M1

2000 Regular Session
(0lr2488)

ENROLLED BILL

— Economic and Environmental Affairs/ Environmental Matters —

Introduced by **Senators Van Hollen, Hogan, Roesser, Frosh, Pinsky, Forehand, and Sfikas**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this __ day of _____ at _____ o'clock, _____ M.

_____
President.

Appendix X

CHAPTER _____

AN ACT concerning

Potomac River Protection Act

FOR the purpose of requiring the Secretary of the Environment to submit certain reports to the General Assembly *by a certain date*; prohibiting the Secretary of the Environment from issuing certain permits before a certain time except when certain conditions are met; providing ~~a certain exception~~ *certain exceptions* to the prohibition against issuing a permit before a certain time; providing that this Act does not preempt or prohibit any ordinance, resolution, law, or rule more stringent than this Act; making provisions of this Act severable; and generally relating to the waters in the Potomac River basin.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) The Secretary of the Environment shall submit the following reports to the General Assembly in accordance with § 2-1246 of the State Government Article *by July 1, 2002*:

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SENATE BILL 729

(1) 2000 Water Demand Forecast and Resource Availability Analysis for the Washington Metropolitan Area, prepared by the Interstate Commission on the Potomac River Basin;

(2) Potomac River Basin-Wide Water Demand Forecast, prepared by the Interstate Commission on the Potomac River Basin; *and*

(3) Maryland's Source Water Assessment Program, prepared by the Department of the Environment~~; and~~

~~(4) If Chapter ___ (H.B. 64) of the Acts of the General Assembly of 2000 takes effect, the report of the Task Force to Study the Minimum Flow Levels in the Potomac River~~.

(b) The Secretary of the Environment may not issue a permit for the construction of a water intake pipe into the Potomac River until 6 months after the Secretary of the Environment has submitted the reports required under subsection (a) of this section unless:

(1) The water intake pipe will meet the following conditions:

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~~(1)~~ *(i)* The new pipe will replace a pipe already in use;

~~(2)~~ *(ii)* The new pipe cannot be used concurrently with the pipe to be replaced;

~~(3)~~ *(iii)* The new pipe ~~cannot~~ does not have the capacity to withdraw an amount of water that exceeds the amount of water authorized to be withdrawn by the water appropriation permit by more than 5 million gallons of water per day; and

~~(4)~~ *(iv)* The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow; *or*

(2) (i) The Secretary determines that the issuance of a permit is in the public interest; and

(ii) The water intake pipe will meet the following conditions:

1. The new pipe will replace a pipe already in use;

2. The new pipe cannot be used concurrently with the pipe to be replaced;

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3. The new pipe will be placed at least 30 inches below the water surface at the Potomac River's historic low flow;

4. The new pipe will not have the capacity to withdraw a greater quantity of water than the quantity of water that can be withdrawn by the existing intake; and

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5. The new pipe will incorporate a physical component, that cannot be modified without the consent of the Department of the Environment, that will limit the capacity of the pipe for maximum daily withdrawal to the maximum amount authorized by the appropriation permit issued to the owner of the pipe under § 5-502 of the Environment Article.

(c) Subsection (b) of this section does not apply to a person who:

(1) Holds or applies for a permit to construct a water intake pipe or structure to withdraw water from the Potomac River; and

(2) Returns all or a majority of the water withdrawn to the Potomac River within 3 miles of the point of withdrawal.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to preempt, prevail over, or prohibit adoption of any ordinance, resolution, law, or rule more stringent than this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other

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provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2000.

APPENDIX Y — DECLARATION OF MARK KRONENTHAL, II EXECUTED APRIL 27, 2000

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT

DECLARATION OF MARK KRONENTHAL, II

Appendix Y

I, Mark Kronenthal, II, declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration.

2. I attended the public hearing on February 22, 2000, of the Senate Economic & Environmental Affairs Committee of the Maryland General Assembly, concerning Maryland Senate Bill 729.

3. The sponsor of S.B. 729, Senator Christopher Van Hollen, stated at the hearing that his legislation, like the bill he proposed the previous year, was "triggered by the fact that the State of Virginia came to the State of Maryland" to build a new drinking water intake in the Potomac River. Senator Van Hollen said that his bill would permit Virginia to have an offshore intake in the Potomac River, but that it would limit the intake capacity to 205 million gallons per day ("MGD"), rather than the 300 MGD capacity sought in the permit application. He stated that the purpose of this limitation was to make sure "they are not fueling more development on the Virginia side of the river, which has been out of control." He stated that a further purpose of his bill was that, since Virginia had sued Maryland in the Supreme Court to declare that Virginia had the right to withdraw water from the Potomac River without Maryland's consent, the limitation on the intake capacity was necessary to prevent Virginia from withdrawing more water from the River in the future without first obtaining Maryland's prior approval.

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4. At the conclusion of the hearing, Senator Clarence W. Blount, the Committee Chairman, remarked that if "Virginia and Maryland were independent states, we would be at war over this."

5. I have also listened to relevant portions of the official audio recordings of the proceedings of the Maryland Senate from March 16, March 17 and March 21, 2000. Those proceedings are available to the public on the Internet at http://mlis.state.md.us/asp/listen.asp. When S.B. 729 as approved by the Senate Committee on Economic and Environmental Affairs was introduced to the full Senate on March 16, 2000 (3/16/00 Senate Recording at 23:41), the floor sponsor said that "what it addresses is the question relating to the County of Fairfax and Virginia's application for a new intake pipe." (3/16/00 Senate Recording at 26:00).

6. S.B. 729 was laid over on March 16, 2000 (3/16/00 Senate Recording at 28:24-29:7), amended on March 17, 2000 (3/17/00 Senate Recording at 51:21, 52:25-58:32), and again on March 21, 2000 (3/21/00 Senate Recording at 1:37:00), to provide an exception (in section 1(c)) that would allow three affected Maryland entities (Pepco, Alleghany Power, and Westvaco) to be exempted from the Bill's prohibition on the construction of water intakes in the Potomac River.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000 /s/ Mark Kronenthal, II

APPENDIX Z — DECLARATION OF CHARLIE C. CROWDER, JR. EXECUTED APRIL 27, 2000

No. 129, Original

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON MOTION FOR LEAVE TO FILE
BILL OF COMPLAINT

DECLARATION OF CHARLIE C. CROWDER, JR.

Appendix Z

I, Charlie C. Crowder, Jr., declare that the following facts are true:

1. I am an adult over 18 years of age, am of sound mind, and have personal knowledge of the facts stated in this Declaration. I am the General Manager for the Fairfax County Water Authority. I have extensive experience, over 27 years, in planning and operating large metropolitan area water systems. My academic background includes an undergraduate degree in civil engineering from the Virginia Military Institute and a graduate degree in public administration from George Washington University.

2. I attended the public hearings on February 22, 2000 before the House and Senate Committees to which the "Potomac River Protection Bills," Senate Bill 729, and House Bill 395 had been referred. J.L. Hearn, the Director of the Water Management Administration for the Maryland Department of Environment ("MDE"), testified that MDE supported both bills with some minor amendments. Mr. Hearn is the Maryland official who signed the ruling dated December 12, 1997 that denied the Authority's waterway construction permit, and he is the person who, thereafter, declined on behalf of his superiors in Maryland State government even to discuss the terms of any of several settlement proposals advanced by the Authority.

3. Prior to the hearing in the House Committee, I spoke with Mr. Hearn about S.B. 729. During our conversation, Mr. Hearn was asked — if the Van Hollen Bill were passed — whether MDE would issue a waterway construction permit for the Authority's project subject to the limitations set forth

in that Bill. Mr. Hearn said he believed that MDE would not issue the permit even for a project that was permitted by the Bill because of the positions that had already been taken against our project by his superiors. I understood him to mean Maryland Governor Glendening and Secretary of Environment Nishida.

4. I am familiar with the three studies referenced in both versions of the bill. Although the completion of these studies and their presentation to the General Assembly allegedly provides the justification for a new moratorium on construction of water intakes, to the best of my knowledge, none of them addresses any environmental or water supply issue implicated in the Authority's offshore intake project.

5. The Authority's proposed offshore intake project will not increase the Authority's capacity to withdraw water from the Potomac River. The capacity of the offshore intake (approximately 300 million gallons a day ("MGD")) would be 25% smaller than the capacity of the Authority's *existing* shoreline intake (approximately 400 MGD).

6. However, both H.B. 395 and S.B. 729 impose a moratorium on water intake construction that would limit the capacity of the Authority's proposed offshore intake to 205 MGD (the amount of the existing appropriation permit plus 5 million gallons a day). This limitation would frustrate the Authority's plan to construct one offshore intake to supply all its future Potomac River demand (300 MGD), and require the Authority to undertake in-river construction for a second time to enlarge the pipeline in the future (duplicating effort and costs) to complete its plan. While S.B. 729 on its

face would permit the Authority to have a replacement offshore intake that is no larger than the Authority's existing intake during the study moratorium, the requirement for a physical component in the pipe to limit water capacity imposes additional, unnecessary costs on the project and ratepayers and, in my view, gives Maryland dangerous authority to restrict the water supply of Northern Virginia.

7. In any case, it is my expectation, as recently confirmed by J.L. Hearn on February 22, 2000, above, that Maryland will continue to delay and impede the Authority's offshore intake project, regardless of the passage of H.B. 395 or S.B. 729, and regardless of results of the three studies referenced in those bills.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on: 4/27/2000 /s/ Charlie C. Crowder, Jr.